In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 856

ELAINE J. LORD, ET AL., PETITIONERS

v.

ROY T. HELMANDOLLAR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 348 F. 2d 780.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1965. A timely petition for rehearing was denied on September 8, 1965. On December 8, 1965, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 6, 1966. The petition for a writ of certiorari was filed on December 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

305-206—66

QUESTION PRESENTED

Whether the court of appeals correctly decided that the district court could not, 141 days after entry of a judgment, permit an untimely appeal by vacating and re-entering the judgment.

STATUTE AND RULES INVOLVED

28 U.S.C. 2107 provides, in pertinent part:

> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.
>
> * * * * *
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * * * *

Rule 73(a), F.R. Civ. P., provides, in pertinent part:

> * * * in any action in which the United States or an officer or agency thereof is a party the time [within which an appeal may be taken] as to all parties shall be 60 days from such entry [of judgment], and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

Rule 77(d), F.R. Civ. P., provides, in pertinent part:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail * * * upon each party who is not

in default for failure to appear * * *. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules * * *. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a).

STATEMENT

This suit was instituted in the United States District Court for the District of Columbia against the Secretary of the Interior and other officials to invalidate Department of the Interior decisions declaring void petitioners' locations of placer mining claims on federal public lands in Arizona. Petitioners' locations had been determined to be void because they did not contain valuable mineral deposits.

Summary judgment was entered against petitioners by the district court on September 30, 1963. Prior to that time, on September 27, 1963, a copy of the proposed judgment was served by mail upon petitioners' Washington, D.C., counsel; a copy of the judgment was also promptly received by petitioners' Washington, D.C., counsel after the judgment was entered. (Pet. App. A; J.A. 78–79). No appeal was taken from this judgment by petitioners within the 60-day period provided by 28 U.S.C. 2107 and Rule 73(a) of the Federal Rules of Civil Procedure.

On February 4, 1964, more than four months after entry of summary judgment against petitioners in the district court, petitioners filed a motion with that court "to vacate and set aside the judgment or order

granting summary judgment * * * and to re-enter said judgment or order, and to allow the plaintiffs to file a Notice of Appeal and to pursue an appeal * * *." (J.A. 75). In support of their motion, petitioners alleged that while their Washington, D.C., counsel had been fully notified of the judgment against petitioners, he had failed, through inadvertence, to notify either petitioners or their Arizona counsel, who had not learned of the judgment in time to perfect a timely appeal (J.A. 76–79).

The district court granted petitioners' motion, vacated the judgment, and re-entered it on February 18, 1964 (Pet. App. B).[1] Petitioners then filed a notice of appeal. The court of appeals, in a *per curiam* opinion, dismissed the appeal for lack of jurisdiction. (Pet. App. C). The court held that the vacation and re-entry of the summary judgment had no effect upon the running of the time in which to appeal from that judgment; consequently, the appeal was untimely.[2]

ARGUMENT

The time provided for taking an appeal from the judgment in this case was 60 days from the entry of judgment (28 U.S.C. 2107; F.R. Civ. P. 73(a), both reproduced *supra*, p. 2). In addition, "upon a

[1] No "relief from judgment" was sought by petitioners under Rule 60(b), F.R. Civ. P., and the district court did not purport to act under that provision.

[2] The government cross-appealed from the district court's order granting the motion to vacate and re-enter judgment. Having found that this order did not extend the time for appeal, the court of appeals dismissed the cross-appeal as moot (Pet. App. C., p. 5).

showing of excusable neglect based on a failure of a party to learn of the entry of judgment" the district court was permitted to "extend the time for appeal not exceeding 30 days from the expiration" of the original 60-day period (*ibid.*). The order of the district court vacating and re-entering the judgment here, however, purported to revive petitioners' right to appeal at a time commencing 80 days after the expiration of the original 60-day period and more than four months after entry of the judgment sought to be appealed from.*

As the court of appeals correctly held, such an additional extension is explicitly precluded by Rule 77(d) of the Federal Rules of Civil Procedure (*supra*, pp. 2–3), the last sentence of which specifically restricts extensions of time to appeal based upon failure of notice to the 30-day extension permitted in Rule 73(a). This change was made in Rule 77(d) in 1946 "to avoid such situations as the one arising in" *Hill* v. *Hawes*, 320 U.S. 520, the effect of which was "to give the district court power, in its discretion and without time limit * * * to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judg-

*Summary judgment was entered on September 20, 1963. The original 60-day period expired on November 29, 1963. Petitioners' motion for vacation and re-entry was made on February 4, 1964, 66 days after the expiration of the original 60-day period. The judgment was re-entered on February 18, 1964, 80 days after the expiration of the original 60-day period and 140 days after entry of the original judgment.

ments" (Advisory Committee Note to Amendment of Rule 77, Approved December 27, 1946). The present case falls squarely within the purpose of this amendment to Rule 77(d).

In the circumstances of this case, moreover, there was no failure of notice warranting even the limited extension for "excusable neglect" under Rule 73(a). Petitioners' Washington, D.C., counsel admittedly received prompt notice of the judgment entered against petitioners. Such notice to counsel was full notice for all purposes under the Rules (Rule 5(a) and (b), F.R. Civ. P).[4] *Harris Lines* v. *Cherry Meat Packers,* 371 U.S. 215 (Pet. 6–8), and *Lieberman* v. *Gulf Oil Corp.,* 315 F. 2d 403 (C.A. 2), relied upon by petitioners (Pet. 14–16), are not to the contrary. In those cases, the appellants delayed their appeals in reliance upon orders of the trial court entered while appeals would have been timely. No such prejudicial reliance upon an order of the district court was present in this case.

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[4] Petitioners' Washington, D.C., counsel, upon whom notice was served, is listed in the district court's civil docket as the attorney for petitioners. Rule 4 of the Rules of the United States District Court for the District of Columbia requires that local Washington, D.C., counsel be associated in actions instituted by counsel residing outside the District of Columbia. Thus an attorney who is a member of the Bar of the District of Columbia and who has an office in the District is required to be available to receive notice and service in pending cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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